No. 90-747

Supreme Court, U.S.
FILED
JUN 14 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF STATE,
Petitioner

v.

MICHAEL D. RAY, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION; GANNETT CO., INC.; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; AMERICAN SOCIETY OF NEWSPAPER EDITORS; SOCIETY OF PROFESSIONAL JOURNALISTS; NATIONAL ASSOCIATION OF BROADCASTERS; NEWSLETTER ASSOCIATION; AND THE NEW YORK TIMES COMPANY IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether FOIA Exemption 6, which allows agencies to withhold information only when disclosure "would constitute a clearly unwarranted invasion of personal privacy," creates a categorical rule of anonymity permitting withholding of information which could identify Haitian citizens interviewed by the State Department.

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INTEREST OF THE AMICI CURIAE

Amici are media organizations or journalists' associations. They depend on the Freedom of Information Act ("FOIA") to obtain primary information from federal agencies and report about government activity to their readers. Journalistic principles demand that government information not be accepted at face value; journalists therefore use information released by government agencies to get an independent viewpoint. Credibility, impact

and human interest demand that stories about individuals not be cloaked in anonymity; journalists reporting on government activities therefore seek the identities of those affected. In this case, the government seeks a rule which, in the guise of defining "public interest" under FOIA's privacy exemptions, denies the applicability of those key journalistic imperatives to FOIA. Therefore, because of the importance of the "public interest" and "derivative use" issues involved in this case, amici offer their perspective gained from 25 years of FOIA experience.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION (ANPA) is a non-profit trade association representing approximately 1,400 member newspapers. Membership constitutes about 90 percent of the total U.S. daily and Sunday newspaper circulation, and a substantial portion of the non-daily newspaper circulation in the United States. ANPA members depend on FOIA to gather the news and ensure the free flow of information to their readers.

GANNETT CO., INC., publishes 82 daily and a variety of non-daily publications and operates ten television and fifteen radio stations. Total circulation of the daily newspapers amounts to over 6.3 million, including USA TODAY, which circulates an average of 1,863,436 newspapers daily. Gannett publications and broadcasts reach an average total audience of over 22 million people across the nation each week. Gannett news organizations, including the Gannett News Service, rely on extensive use of the FOIA and state equivalents to develop story leads, obtain information, and gather the news.

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS is a voluntary association of reporters and news editors from the print and broadcast media. The Reporters Committee, founded in 1970, is governed by a steering committee of news reporters from around the country. Its legal defense and research efforts are

devoted to the protection of First Amendment values and freedom of information interests of the news media.

The Reporters Committee has provided information, representation, legal guidance and research in virtually every significant federal and state appellate press freedom case since 1972. As a special project, the Reporters Committee sponsors the Freedom of Information Service Center, which advises reporters on issues of access to government records and proceedings. The FOI Service Center daily handles calls from reporters and editors seeking advice in their attempt to use FOI laws to inform the public about what their government is up to.

AMERICAN SOCIETY OF NEWSPAPER EDITORS is a nationwide professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States.

NATIONAL ASSOCIATION OF BROADCASTERS (NAB) organized in 1922, is a non-profit incorporated trade association that serves and represents America's radio and television stations and all the major networks. NAB's members cover, produce and broadcast the news to the American people, often utilizing FOIA in the process. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public concern.

NEWSLETTER ASSOCIATION represents 850 publishers of newsletters and specialized information services. The association's members regularly depend on information contained in agency records to educate their readers regarding vital issues of public policy. Many of these issues, while initially reported only in the specialized press, ultimately become matters of widespread public concern and subjects of intense coverage in the mass media.

THE NEW YORK TIMES COMPANY publishes 33 newspapers, including *The New York Times*, a daily newspaper with national circulation of over 1.2 million daily and Sunday circulation of over 1.75 million. The Company also publishes 17 magazines and owns five television and two radio stations.

THE SOCIETY OF PROFESSIONAL JOURNALISTS is a voluntary, non-profit organization of nearly 20,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism.

Amici believes that the Freedom of Information Act must be interpreted in a manner that encourages the free flow of information from government to its citizens. This requires a narrow interpretation of any exemptions and particularly requires rejection of categorical nondisclosure rules. Because they believe Petitioner's argument for reversal rests impermissibly on a categorical rule of nondisclosure alien to FOIA's spirit and purpose, *amici* urge affirmance of the court of appeals' decision.

SUMMARY OF ARGUMENT

The Department argues for an interpretation of FOIA Exemption 6 (5 U.S.C. § 552(b)(6)) which, if accepted, would represent a revolutionary judicial revision of the FOIA. By urging what amounts to a categorical rule of anonymity in Exemption 6 cases, the Department would have the Court nullify the careful balance between privacy and the public interest that Congress created. Such an outcome finds no support in the statute and would be an unwarranted extension of the Court's decision in *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) ("*Reporters Committee*").

Amici believe that the Department's categorical anonymity rule would severely undercut the value of FOIA for journalists, who serve as the public's primary agents

in determining "what their government is up to." Monitoring *who* the government's actions are affecting often can be as important as knowing what it is doing. A categorical anonymity rule would conceal whether agencies are carrying out their responsibilities effectively or evenhandedly. It would also block journalists' access to important sources of information, making it impossible to follow up on promising leads suggested by the information. Media requesters would then have little choice but to accept an agency's sanitized version of how its operations affect citizens.

Amici therefore urge the Court to reject any new Exemption 6 analysis in favor of reiterating the traditional balancing test between privacy and the public interest. The Court should also reject any narrow interpretation of public interest which is limited to the "intrinsic value" of government information. No public interest test should ignore the potential uses of information gleaned from government files. Journalists' role is to question, analyze and follow-up on the information that they gain from government sources, not accept it at face value. Many important chronicles of government inaction and folly developed from using FOIA as a starting point for further investigative reporting. The public interest under FOIA Exemption 6, therefore, must encompass the concept of "derivative use."

FOIA balancing should also recognize that privacy interests can range from the trivial to the substantial and that it is the courts' role to weigh, in particular cases, the strength of the privacy interests asserted. A categorical anonymity rule, which invariably exalts privacy interests, is simply not consistent with FOIA's intent to promote disclosure while prohibiting only "clearly unwarranted" invasions of privacy.

ARGUMENT

I. THE GOVERNMENT IMPROPERLY INTERPRETS EXEMPTION 6 AND *REPORTERS COMMITTEE* TO ALLOW A CATEGORICAL ANONYMITY RULE

In its brief, Petitioner, the United States Department of State ("Department"), presents a revisionist view of FOIA far different than Congress intended. According to the Department's new construct, "responsible disclosure" under the FOIA requires nothing less than the creation of a categorical anonymity rule which would allow withholding of personally identifiable information in all circumstances:

> The "workable formula" that Congress intended to apply in providing for the fullest responsible disclosure of government records is thus achieved by permitting the release of the information compiled by the government, *so long as anonymity is maintained.*

Petitioner's Brief at 16 (emphasis added). The Department relies primarily on this proposed anonymity rule in urging reversal. Although it admits that its interviews with Haitian citizens should be disclosed, the Department nonetheless argues that FOIA requires categorical withholding of any information that could identify those interviewed. The Department's reason for doing so does not rely on balancing privacy interests and the public interest in disclosure. Rather, it relies on a new interpretation of FOIA Exemption 6 that would, *in all circumstances*, deny a public interest in information which could identify individuals.

In advancing its new theory of FOIA Exemption 6, the Department invites this Court to misread and expand *Reporters Committee* in a manner that would eliminate balancing the public interest in identifying individuals affected by government action. This allows the Department to argue that FOIA invariably endorses anonymity:

> The deletion of personal identification information from government reports is thus "unquestionably appropriate because the names of the particular" persons involved are "irrelevant to the inquiry into the way the" government administers its responsibilities . . . "disclosure of records concerning private citizens identifiable by name is not what the framers of the FOIA had in mind."

Petitioner's Brief at 19 (citations omitted).

The Department's proposed categorical anonymity rule would permit agencies to withhold personal identifying information from disclosed government records in all cases where the agency could say that a privacy interest was implicated. For example, the rule would exempt names of recipients of federal grants or loans, even if they were made to large campaign contributors or the agency officers themselves. Because, under the Department's theory, the identity of the individuals given public benefits is always "irrelevant" to the public's understanding of government operations, Petitioner's Brief at 19, this information would invariably be withheld under the Department's anonymity rule. The same rule would exempt all subjects of federal enforcement actions, pending or not. *Id.* Absent explicit statutory authorization mandating disclosure, the Department's proposed rule would permit withholding the identities of individuals who hold government contracts. Stretched to its Kafkaesque limits, the Department's reasoning would foster a government of faceless bureaucrats making decisions about anonymous subjects.

Congress never intended to create such a broad, *per se* anonymity rule. In inviting this Court to do so judicially, the Department wrenches language from *Reporters Committee* out of context and extends its holding far beyond the circumstances of that case.

A. *Reporters Committee* Provides No Support For A Categorical Anonymity Rule

Reporters Committee concerned "rap sheet" information about individuals collected and stored in the FBI's

huge computerized data collection.[1] 489 U.S. at 751. The FBI did not create the rap sheet information. It was, instead, part of a centralized aggregation of state and local information collected for law-enforcement purposes. The FBI refused to release any part of the information. In these circumstances, the Court concluded that it would not advance FOIA's purposes to disclose the individual-specific information sought in *Reporters Committee*, since that information had no connection with federal government activity other than the fact that the government collected it. *See* 489 U.S. at 773.

Concluding that FOIA's oversight function would not be advanced by public access, *Reporters Committee* held that a categorical nondisclosure rule could apply to collections of personal information held in government law enforcement databanks. Although it acknowledged that FOIA exemption 7(C) (5 U.S.C. § 552(b)(7)(C)) generally contemplates particularized balancing, the Court concluded that where the FOIA request merely involved law enforcement information about individuals held by the government in its data storehouse role, these specific circumstances militated in favor of a categorical nondisclosure rule.[2] 489 U.S. at 779-80. Fundamental to the Court's holding was the belief that, in this special situation, privacy concerns peaked and the countervailing interests favoring disclosure diminished to insignificance. 489 U.S. at 780.

This case involves far different circumstances. Respondent seeks Department summaries of interviews with Haitians who were turned back attempting to flee to the

[1] That data collection contained rap sheets on over 24 million persons. 489 U.S. at 751.

[2] The Court was also heavily influenced by the 1986 amendments to Exemption 7(C) and Congress' broadening of the law enforcement exemption to "give the Government greater flexibility in responding to FOIA requests for law enforcement records or information." 489 U.S. at 777 n.22.

United States. As the Department acknowledges, this information is within even its notion of the public interest, since the information can aid the public in overseeing the Department's enforcement of the immigration laws. Petitioner's Brief at 20. The Department's sole argument pertains to whether information identifying the interviewees should be redacted or not, an issue that raises different concerns than those present in *Reporters Committee*.

Despite these different circumstances, the Department would have this Court extend its *Reporters Committee* holding to create a far-reaching, categorical anonymity rule for all situations implicating Exemption 6. Such a rule is unworkable, for it has no limiting principle and allows for no check on the overzealous redacter. This case and the typical Exemption 6 case involve a dispute where the government releases some information, but claims a right to withhold additional personal identifying information on privacy grounds. The Department does not disclose, however, how it will make bright-line judgments about withholding "other information" that may both reveal government operations and potentially serve to identify individuals. *See Department of the Air Force v. Rose*, 425 U.S. 352, 380-81 (1976). Congress recognized that agencies have a built-in bias to withhold information and designed FOIA to combat that tendency by creating a presumption of disclosure, a limited list of exemptions, and judicial authority to oversee agencies' adherence to this statutory scheme. *Id.* at 361. The Department's proposed categorical rule goes against the grain of FOIA's intent to give the judiciary meaningful oversight over agencies' decisions to withhold information.

Amici believe that it can never be appropriate to create a categorical rule for determining how much of that information should be released or not. The particular circumstances will determine both the nature of the public interest in disclosure and the strength of any privacy

interest involved. This is what traditional Exemption 6 balancing is all about.

Along with misreading *Reporters Committee*[3] and insulating redaction decisions from effective oversight, the Department's proposed rule ignores the crucial differences between FOIA Exemptions 6 and 7. It also disregards Congressional instructions to fashion a balance which neither abrogates nor substantially subordinates either privacy or the public interest. Finally, it runs counter to this court's rejection of a categorical rule in

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[3] Petitioner does so principally by taking language out of context and ignoring the qualifications *Reporters Committee* places on some of its statements about personally identifiable information. For example, the Department relies on footnote 18 of *Reporters Committee* in fashioning its argument for a categorical anonymity rule. *See* Petitioner's Brief at 18-19 n.8, quoting 489 U.S. at 766 n.18, which in turn quotes legislative history. Note 18 and the quoted legislative history, however, contain an important qualification to Congress' general statement about the public not needing to know the identities of individuals affected by government decisionmaking —"*if the identification has no bearing or effect on the general public.*" It is precisely this qualification which precludes any categorical rule. There are numerous situations where identification of individuals will have an important effect on the general public and its oversight of government. See pages 17-23, *infra*. Moreover, contrary to the Department's assertion (Petitioner's Brief at 16-17, 20), FOIA's redaction provision (5 U.S.C. 552(b)) and *Department of the Air Force v. Rose*, 425 U.S. 352 (1982), similarly provide no support for a categorical rule of anonymity. The result in *Rose* came about because of the particular circumstances involved, not as part of an intent to create a general rule of anonymity. *Rose* recognizes, by its approving citation to remarks of the principal sponsor of the FOIA amendment which became 5 U.S.C. § 552(b), that redaction to ensure anonymity should only occur when the strength of privacy concerns warrant it:

> For example, deletion of names and identifying characteristics of individuals *would in some cases* serve the underlying purposes of exemption 6 . . .

Rose, 424 U.S. at 375, quoting 120 Cong. Rec. 17018 (1974) (remarks of Sen. Kennedy (emphasis added).

other cases involving restrictions on the free flow of information.

B. Exemption 6 Requires An Exacting Standard In Order To Deny Disclosure

Reporters Committee involved an interpretation of FOIA Exemption 7(C), which pertains to law enforcement records. This case involves Exemption 6, the general privacy exemption under FOIA. Although several courts have accepted that *Reporters Committee* has some applicability to FOIA Exemption 6,[4] the key differences between the exemptions requires that this Court not apply *Reporters Committee*'s Exemption 7(C) holding to Exemption 6 cases, let alone extend it as the Department would have this Court do. Exemption 6 creates a different standard than Exemption 7(C) in that the privacy interest threatened by disclosure must be greater for Exemption 6 to apply. Unlike Exemption 7(C), Exemption 6 requires that the invasion of privacy be "*clearly* unwarranted." Exemption 7(C) omits the adverb "clearly." Moreover, Section 7(C) requires only a showing that disclosure "could reasonably be expected" to constitute an invasion of privacy, whereas Exemption 6 refers to disclosures that "would constitute" an invasion. 489 U.S. at 767-68.

This Court has previously recognized the distinctions between Exemption 6 and Exemption 7(C), noting that the "clearly unwarranted" language was a considered decision of Congress to accord privacy interests less weight under Exemption 6 than under Exemption 7(C). *Reporters Committee*, 489 U.S. at 756; *Department of the Air Force v. Rose*, 425 U.S. at 379 n.16. *See also*

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[4] *See, e.g., Hopkins v. HUD*, 929 F.2d 81 (2d Cir. 1991); *FLRA v. U.S. Dep't of the Treasury*, 884 F.2d 1446, 1451-1452 (D.C. Cir. 1989), cert. denied, 110 S.Ct. 863 (1990); *National Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873 (D.C. Cir. 989), cert. denied, 110 S.Ct. 1805 (1990).

Fund for Constitutional Government v. Nat'l Archives and Records Service, 656 F.2d 856, 862 (D.C. Cir. 1981); Note, *Applying the Freedom of Information Act's Privacy Exemption to Requests for Lists of Names and Addresses*, 58 Fordham Univ. Law Rev. 1033, 1044, n.65 (1990) (citing legislative history rejecting attempts to eliminate "clearly unwarranted" language). Thus, the standard for assessing a threatened invasion of privacy under Exemption 6 is different than that under Exemption 7(C). *Reporters Committee*, 489 U.S. at 756. Amici believe that it would be fundamentally wrong to give privacy interests the same weight under Exemption 6 as they are given under Exemption 7(C), let alone create a categorical rule that allows asserted privacy interests always to trump the interests in disclosure. Congress intended no such result.

C. Congress Intended Particularized Balancing

Instead, Congress intended that courts balance privacy interests and the public interest to be gained from disclosure. As this Court recognized in *Department of the Air Force v. Rose*, 425 U.S. at 372-73, Exemption 6 requires balancing:

> The phrase "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public right to government information.

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). *See also* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966). Congress understood that balancing would not always be easy or convenient, yet nonetheless believed that it would more properly advance FOIA's purposes than would some categorical rule:

> It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.

S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Similarly, the House emphasized the values it was furthering by requiring balancing:

> It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. *The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government.*

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6 (emphasis added). Congress' intent is clear. Neither privacy nor public interest should be subordinated to the other, which indicates a strong disfavoring of any categorical rule. Equally important, Congress emphasized its preference for disclosure and cautioned against a rule that would foster "indiscriminate secrecy."

D. First Amendment Access Cases Also Favor A Balance Between Competing Interests

By insisting on anonymity in all circumstances, the Department's proposed rule would foster the very "indiscriminate secrecy" that Congress sought to avoid. It also runs counter to bedrock democratic principles, which depend upon openness and the free flow of information as important limits on government. This dependence necessarily includes openness about how government affects individual citizens. "Without publicity, all other checks are insufficient; in comparison of publicity, all other checks are of small account." *In re Oliver*, 333 U.S. 257, 271 (1948).

This Court's First Amendment jurisprudence, emphasizing the relationship between democratic govern-

ment and access to information, demonstrates the defects in the Department's proposed categorical anonymity rule. Although explicit recognition of a constitutional right of access to Executive Branch information is not necessary to decide this case, this Court can acknowledge the First Amendment implications of creating categorical rules that would restrict disclosure of government information. *See Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 18 (1986) (Stevens, J., dissenting) (a proper construction of First Amendment embraces right of access to government information); *Houchins v. KQED, Inc.*, 438 U.S. 1, 30-32 (1978) (Stevens, J., dissenting) (First Amendment protects acquisition of information from government); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting) (First Amendment concerns encompass the receipt of information as well as right of free expression).

The Court should also decide this case with full recognition of the close correlation between FOIA's policies and those of the First Amendment. Both FOIA and the First Amendment have as their basic purpose ensuring the informed citizenry vital to the functioning of a democratic society. *FBI v. Abramson*, 456 U.S. 615, 621 (1982) (FOIA); T. Emerson, *Toward A General Theory of the First Amendment* 112 (1963) (successful operation of a democratic society depends upon members of society having access to the information necessary for making decisions). The Department's proposed categorical rule will negatively impact those purposes, creating a irrebutable presumption of nondisclosure rather than disclosure.

The Court has repeatedly rejected this course in the judicial access area, holding that categorical privacy rules cannot overcome the principle of openness. In *Press Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), the Court recognized the importance of jurors' privacy rights, but struck down a trial court's decision which closed voir dire proceedings to the public and press based

upon a generalized notion that those privacy rights overcame the value of openness:

> The privacy interests of such a prospective juror must be balanced against the historical values we have discussed and the need for openness of the process.

464 U.S. at 512. Similarly, in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), the Court discussed the privacy rights of child victims of sexual crimes. It held those interests could not justify a categorical rule denying access to criminal proceedings:

> But as compelling as that interest is, it does not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of that interest.

457 U.S. at 607-08. Finally, in *Waller v. Georgia*, 467 U.S. 39 (1984), the Court used a Sixth Amendment rationale to strike down another impermissibly broad rule of secrecy premised on privacy notions. The Court's clear conclusion was that particularized examination of all factors was a constitutional requirement:

> Here, however, the State's proffer was not specific as to whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes. As a result, the trial court's findings were broad and general, and did not purport to justify closure of the entire hearing.

467 U.S. at 48.

The Department's proposed categorical anonymity rule suffers from the same fatal flaw as the broad rules of secrecy struck down in the judicial access cases.[5] Without

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[5] *Cf. also Nixon v. Administrator of General Services*, 433 U.S. 425, 458 (1977) (Merits of privacy invasion claim should not be considered in the abstract; any privacy intrusion must be weighed against public interest).

particularized consideration of the individual circumstances, the proposed categorical anonymity rule would invariably restrict the free flow of information based upon generalized privacy concepts. The Court has rejected this course in the judicial access area and should do the same here, especially in light of FOIA's strong pro-disclosure bias. Constitutional principles, as well as Congress' intent, compel this result.

II. DERIVATIVE USE OF INFORMATION IS NOT PROHIBITED BY FOIA

A. *Reporters Committee* Permits Analyzing The Use To Which Information Can Be Put

The second flaw in the Department's argument is its assertion that the potential uses of information have no relevancy under FOIA. Only by viewing names in isolation and then arguing FOIA allows no "derivative use" can the Department maintain that there is never a public interest in the disclosure of information about individuals. This "no-derivative use" premise is crucial to the Department's argument for a categorical anonymity rule, for it enables the Department to avoid any balancing between privacy and the public interest.

By relying on the vague notion that FOIA applies only to information that "directly" sheds light on government operations, Petitioner's Brief at 23, the Department manufactures a limitation that finds no textual or structural support in FOIA. Moreover, the Department's position cannot be sustained as a practical principle because it disregards the many subsequent uses of information which can shed light on government operations. "Derivative use" is a hallmark of good journalism, as well as a critical tool in assessing "what the government is up to." For this reason, this Court should not prohibit "derivative use" unless Congressional intent is clear or FOIA's policies demand the limitation the Department seeks. There is no such support for the Department's proposed

limitation. Rather, the only basis for the Department's argument rests upon another misinterpretation of *Reporters Committee*.

Reporters Committee stands for the proposition that information must reveal government conduct in order to meet FOIA's public interest standard. 489 U.S. at 774-775. Contrary to the Department's assertion, *Reporters Committee* does not slam the door on the possibility that personally identifiable information *may* satisfy the public interest standard. Rather, satisfaction of that standard depends "on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny.'" 489 U.S. at 772. When personally identifiable information has a relationship to overseeing government operations and will shed light on "what government is up to," a legitimate public interest exists and FOIA compels a court to balance that interest against the asserted privacy interest. *Id.* This is the conclusion properly drawn by the court of appeals, as well as by other courts which have faced the issue after *Reporters Committee*. *See Ray v. U.S. Dep't of Justice*, 908 F.2d 1549, 1556 (11th Cir. 1990); *Hopkins v. HUD*, 929 F.2d 81, 86 (2d Cir. 1991); *Painting Industry of Hawaii v. U.S. Dep't of the Air Force*, 751 F. Supp. 1410, 1417 (D. Haw.), *reconsideration denied*, 756 F. Supp. 452 (D. Haw. 1990).

This conclusion necessarily follows from government's ability to affect those it governs. It does so in many ways—as adjudicator, as contractor, as dispenser of benefits, as employer and as licensor. In all of those roles, government agencies must deal with individuals according to statutory standards. Agencies, furthermore, owe a general duty of evenhandedness. Monitoring that performance is an important public interest, and identification of individuals, or information about individuals, is critical to that role. Articles from *amici*'s members have

evaluated agency practices to determine whether they were engaged in unfair discrimination, have evaluated government operations to determine whether political favoritism is involved, and have generally assessed the impact of government decisions on the individuals directly affected by them. All these articles depended on personally identifiable information which would be withheld as "irrelevant" under the Department's interpretation of the public interest. There can be no doubt that this use of personally identifiable information can shed light on important governmental operations, for it enables the public to determine whether an agency is fulfilling its statutory mandate and whether it is acting fairly and nondiscriminatorily. *See IBEW Local Union No. 5 v. HUD*, 852 F.2d 87, 90-91 (2d Cir. 1988); *United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 598 v. Department of the Army*, 841 F.2d 1459 (9th Cir. 1988); *Heights Community Congress v. Veterans Administration*, 732 F.2d 526, 530 (6th Cir. 1984); *IBEW, Local 41 v. HUD*, 593 F. Supp. 542 (D.D.C. 1984), *aff'd*, 763 F.2d 435 (D.C. Cir. 1985); *Painting Industry of Hawaii v. U.S. Dep't of the Air Force*, 751 F. Supp. 1410, 1417 (D. Haw.), *reconsideration denied*, 756 F. Supp. 452 (D. Haw. 1990).

Similar results can be obtained by other subsequent uses of information disclosed through FOIA. FOIA requesters must be free to analyze data obtained through FOIA, compare it with other publicly available information, or use it as a basis for asking pointed questions of government officials. The information used in this manner would not "directly" shed light on governmental operations, nor would it do so "in and of itself." All of these are arguably "derivative uses" of government information that the Department would now claim are outside FOIA to the extent they involve personally identifiable information, yet all could lead to important disclosures about government operations.

Nonetheless, the Department urges a bright-line test, premised on the conclusion that *Reporters Committee* precludes inquiry into the requester's intended use of any information. The Department's premise confuses "use" with a FOIA requester's "purpose" and rests on a misapprehension of the FOIA precedents. Although the Department correctly states that a FOIA requester's identity and/or particular motivation for making the request are irrelevant, Petitioner's Brief at 25-26, this does not mean that the potential uses of the information cannot be considered in determining whether the disclosure casts light on governmental operations. On the contrary, *Reporters Committee* would permit consideration of the potential "subsequent uses" of the information. It denied disclosure of the FBI rap sheets precisely because the subsequent uses of the information could not shed light on the workings of government:

> In this case—and presumably in the typical case in which one private citizen is seeking information about another—*the requester does not intend to discover anything about the conduct of the agency . . .*

489 U.S. at 773 (emphasis added). *See also Halloran v. Veterans Administration*, 874 F.2d 315, 323 (5th Cir. 1989) (disclosure depends on the *information*'s relationship to the purpose of informing the citizenry about the activities of government).

If requested information must "show what the government is up to," considering how the information may be used is a legitimate and effective method of assessing the strength of the public interest involved. The only way to determine whether the public can "discover anything about the conduct of the agency" is through an analysis of the potential uses of the information. This analysis must be information-specific. It need not depend upon the identity of the requester or the requester's motivation in seeking the information. *Kurzon v. HHS*, 649 F.2d 65, 68 (1st Cir. 1981) (court must distinguish between im-

portance of subject matter of request and prospects of requester as standard bearer for public interest). Rather, it focuses on the information which is sought and the circumstances in each case. *See Reporters Committee for Freedom of the Press v. U.S. Dep't of Justice*, 831 F.2d 1124, 1129 (D.C. Cir. 1987) (Starr, J. dissenting on rehearing).

B. "Derivative Use" Of Information Is Vital To Journalists In Determining What Government Is Up To

The court of appeals recognized that the information contained in a government document can be crucial to uncovering governmental conduct, even if the requested information does not "directly" reveal the nature of that conduct. 908 F.2d at 1555. As long as the information can be used to reveal government conduct, it satisfies the threshold public interest standard under Exemption 6. 908 F.2d at 1555-56. This conclusion is a legitimate interpretation of FOIA and should be affirmed.

"Derivative use" is critical because the Department's proposed alternative, in the guise of fostering administrative convenience,[6] does too little to advance FOIA's central pro-disclosure purpose. Information released pursuant to a FOIA request may sometimes in and of itself reveal the full nature of government conduct. In far more cases, however, it will not. In those cases the information may be a necessary link to additional information, part of a larger puzzle where the pieces must be carefully searched out and assembled. The end product can be, and often is, the exposure of governmental action, ineffectiveness or misconduct which is unquestionably within the public's right to know. Yet, if the initial information

[6] The Department's argument against assessing potential uses of requested information depends in large part on the perceived administrative and judicial burdens inherent in particularized balancing. Petitioner's Brief at 26. Burdened or not, however, the Department and the courts are constrained to enforce FOIA's balancing requirement until Congress decides to change it.

is not released because it does not "directly" reveal governmental activity, the end result may never reach the public.

Amici have traditionally used public records to get the first puzzle parts, the key corner pieces, which are later supplemented with additional reporting and investigation. Investigative journalism's time-tested methodology involves following all leads and conducting follow-up interviews in an independent search for truth. Countless award-winning reports have used personally identifiable information in public documents as a springboard to uncover additional publicly available information, to direct questions to government officials, and to conduct follow-up interviews with the individuals affected. The resulting stories have ranged from those promoting a better public understanding of how government operates to exposés of unsatisfactory governmental conduct. These revelations of how government does or does not carry out its functions have furthered our system of self-government and resulted in public responses ranging from appreciation of government's successes to demands to have abuses remedied. They unquestionably serve FOIA's central purpose —to enable the public "to decide *for itself* whether government action is proper." *Washington Post Co. v. HHS*, 690 F.2d 252, 264 (D.C. Cir. 1982).

Below are merely a few examples of investigative journalism which have been substantially aided by "derivative use" of personally identifiable information obtained through freedom of information laws or other public sources:

• A deeply-compelling Pulitzer Prize-winning series uncovered the deaths of fifty-one children and the abuse of countless others while under the "protection" of Georgia's child welfare system. The stories documented the utter failure of the system to keep track of the children under its care, many of whom lived in dangerous and appalling

conditions and suffered preventable deaths and serious physical and emotional damage. Ironically, reporter Jane Hansen found that long-standing confidentiality laws, ostensibly designed to protect the privacy of children, forbade the release of information—even about dead children —which could have saved them or others from brutal beatings and death. As a direct result of the public outcry following this series, Georgia appropriated several million dollars to reform its child welfare system, inquiries by prospective foster parents quadrupled, and volunteerism increased at an overtaxed charity hospital caring for abused and drug-addicted babies and children. *See* Hansen, *Suffer the Children*, Atlanta Journal-Constitution, June 4-10, 1989.

• Another Pulitzer Prize-winning report exposed physicians in Indiana who had been found liable for malpractice several times, yet continued to practice medicine and were never disciplined by the responsible state agency. The repeated malpractice of these doctors resulted in dead as well as crippled and deformed patients who, due to Indiana's laws, were compensated for only a fraction of their subsequent medical costs. *See* Hallinan and Headden, *A Case of Neglect: Medical Malpractice in Indiana*, The Indianapolis Star, June 24-26, 1990 at 1.

• After three military helicopters crashed in 1987 during routine night flights in Orange County, California, one reporter investigated the suspicious pattern. Military authorities initially maintained that there were no common cause in the crashes, but the reporter's investigation proved otherwise. After interviews established that all of the pilots who crashed had been wearing night-vision goggles, reporter Edward Humes made extensive FOIA requests for detailed accident reports and military data. Using the names provided in these reports, he interviewed families of crash victims, pilots, engineers and military officials to uncover the fact that obsolete night-vision goggles had led to at least 56 crashes and 130 deaths nationwide. In addition to winning a Pulitzer

Prize, Humes' series led to a congressional investigation, new safety regulations designed to better ensure the safety of military aviators, and improved equipment. *See* Humes, *Death in the Dark*, Orange County Register, December 4, 7, 8, 1988.

• In another series that shows the importance of getting behind anonymous statistics, reporters Sean Holton and Mark Vosburgh of The Orlando Sentinel wrote a series in 1989 that explored the consequences of Florida's policy of relieving prison overcrowding by releasing inmates back into society before their sentences had expired. The reporters cross-referenced computerized prison records with publicly available criminal history records to disclose that nearly a third of those inmates released early had committed new crimes while they still would have been serving time for the old crimes, but for the early release policy. If they had not been able to identify those inmates released through the prison records, the reporters would never have been able to show the impact of Florida's early release policy. As a result of the series, 55 of Florida's 67 sheriffs joined in a lawsuit challenging the early release policy. *See* Holton and Vosburgh, *Crime Before Its Time*, The Orlando Sentinel, August 13-16, 1989.

These articles succeeded in revealing troublesome government activities and promoting citizen responses because reporters obtained enough additional information to get behind the facts released by government authorities. Absent the ability to obtain names or other identifying details from the government, only incomplete information can be presented to the public. Moreover, anonymous, sanitized information rarely can have the same effect as stories about flesh-and-blood people. Identification of individuals strengthens the impact and credibility of newsworthy articles. It obviates any impression that the problem is remote or hypothetical, and brings home the immediacy and urgency of the topic. *See Gilbert v. Medical Economics Co.*, 665 F.2d 305, 308 (10th Cir. 1981).

In supporting an analysis that considers potential uses of information as part of the public interest calculus, *amici* do not suggest that journalists should be specially favored regarding the disclosure of governmental information. As the court of appeals recognized, the concept applies even to non-media requesters. Nor does "derivative use," as petitioners suggest, "stand this Court's decisions on their head." Petitioner's Brief at 21. Contrary to Petitioner's assertion, "derivative use" will not automatically lead to release of information which substantially implicates privacy interests. The Department's argument to the contrary is, at bottom, nothing more than *ad horrendum* pleading. Assessing the potential "derivative use" of information applies only to the public interest side of the balance, which still must be weighed with the privacy interests involved. After the weighing is done, release will follow only when the public interest outweighs privacy interests. Thus, far from eliminating privacy from the calculus, a "derivative use" assessment restores public interest to the balance, preventing the Department from arguing, speciously, that something outweighs nothing every time. *See* Petitioner's Brief at 27.

"Derivative use," therefore, is a concept consistent with journalists' use of FOIA over the past 25 years and represents no new doctrine. It is completely consistent with FOIA's objectives to consider, in the balance between privacy and the public interest, the manner in which identifying information can be linked to government activities.

III. A CATEGORICAL ANONYMITY RULE GIVES TOO MUCH WEIGHT TO PRIVACY INTERESTS

The final flaw in the Department's proposed categorical anonymity rule is the equal weight it would accord all privacy interests, even trivial ones. Exemption 6 only allows withholding of information which "would constitute a clearly unwarranted invasion of privacy." 5 U.S.C. § 552(b)(6). The Department's proposed anonymity rule

presupposes that *any* revelation of an individual's identity in *any* circumstances would justify withholding the information. This writes the "clearly unwarranted invasion of privacy" requirement out of Exemption 6.

The Department's proposed rule exalts privacy interests too much. The strength of privacy interests will vary. In general, FOIA recognizes no strong privacy interest in simply having one's identity revealed. Congress was more concerned with disclosures revealing "intimate detail" of a "highly personal nature." *See* H.R. Rep. 1497, 89th Cong., 2d Sess. 13 (1966); S. Rep. 813, 89th Cong., 1st Sess. 9 (1965). Even if identifying information can rise to the level of a "clearly unwarranted invasion of privacy," however, circumstances where this could occur are too variable to accept the Department's categorical rule. Rather, the privacy interest in an individual's identity must be assessed in light of a number of factors, including (1) the extent to which disclosure will lead to embarrassment or injury to reputation; (2) whether disclosure will lead to unreasonable intrusion; and (3) whether, given all the circumstances, the individual has a reasonable expectation of anonymity. Not all invasions of privacy are precluded through Exemption 6—"[it] does not protect against disclosure every incidental invasion of privacy—only such disclosures as constitute 'clearly unwarranted' invasions of personal privacy." *Department of the Air Force v. Rose*, 425 U.S. at 382.

Analyzed in light of these factors, the court below correctly concluded that the Haitian returnees had some privacy interests which were nonetheless outweighed by the public interest in monitoring how the Department fulfills its responsibilities. 908 F.2d at 1554-56. *Amici* believe this careful, fact-intensive balancing of *both* privacy and the public interest far better serves FOIA's purposes than a rule which virtually ignores the pro-disclosure side of the scale.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Dated: June 14, 1991

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